United States District Court
For the Northern District of California

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3   *E-Filed 9/23/10*

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8   UNITED STATES DISTRICT COURT

9   NORTHERN DISTRICT OF CALIFORNIA

10   SAN FRANCISCO DIVISION

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12   JAMES ALAN BUSH,   No. C 09-1022 RS (PR)

13   Plaintiff,   **ORDER DIRECTING DEFENDANTS**
                                                 TO FILE A DISPOSITIVE ORDER
14   v.

15   SANTA CLARA DEPT. OF
     CORRECTIONS, et al.,
16
                Defendants.
17   /

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19   This is a federal civil rights action filed by a *pro se* state prisoner pursuant to 42

20   U.S.C. § 1983. The parties are instructed as follows:

21   1.   No later than ninety (90) days from the date of this order, defendants shall file a

22   motion for summary judgment or other dispositive motion with respect to the claims in the

23   amended complaint.

24   a.   If defendants elect to file a motion to dismiss on the grounds plaintiff

25   failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),

26   defendants shall do so in an unenumerated Rule 12(b) motion pursuant to *Wyatt v. Terhune*,

27   315 F.3d 1108, 1119–20 (9th Cir. 2003), cert. denied *Alameida v. Terhune*, 540 U.S. 810

28   (2003).

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1   b.   Any motion for summary judgment shall be supported by adequate

2 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of

3 Civil Procedure. Defendants are advised that summary judgment cannot be granted, nor

4 qualified immunity found, if material facts are in dispute. If any defendant is of the opinion

5 that this case cannot be resolved by summary judgment, he shall so inform the Court prior to

6 the date the summary judgment motion is due.

7   2.   Plaintiff's opposition to the dispositive motion shall be filed with the Court and

8 served on defendants no later than forty-five (45) days from the date defendants' motion is

9 filed.

10   a.   In the event the defendants file an unenumerated motion to dismiss

11 under Rule 12(b), plaintiff is hereby cautioned as follows:

12   The defendants have made a motion to dismiss pursuant to Rule 12(b) of the

13 Federal Rules of Civil Procedure, on the ground you have not exhausted your administrative

14 remedies. The motion will, if granted, result in the dismissal of your case. When a party you

15 are suing makes a motion to dismiss for failure to exhaust, and that motion is properly

16 supported by declarations (or other sworn testimony) and/or documents, you may not simply

17 rely on what your complaint says. Instead, you must set out specific facts in declarations,

18 depositions, answers to interrogatories, or documents, that contradict the facts shown in the

19 defendant's declarations and documents and show that you have in fact exhausted your

20 claims. If you do not submit your own evidence in opposition, the motion to dismiss, if

21 appropriate, may be granted and the case dismissed.

22   b.   In the event defendants file a motion for summary judgment,

23 the Ninth Circuit has held that the following notice should be given to plaintiffs:

24   The defendants have made a motion for summary judgment by which they

25 seek to have your case dismissed. A motion for summary judgment under Rule 56 of the

26 Federal Rules of Civil Procedure will, if granted, end your case.

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Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact — that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendants' declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted in favor of defendants, your case will be dismissed and there will be no trial. *See Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to read Rule 56 of the Federal Rules of Civil Procedure and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (holding party opposing summary judgment must come forward with evidence showing triable issues of material fact on every essential element of his claim). Plaintiff is cautioned that failure to file an opposition to defendants' motion for summary judgment may be deemed to be a consent by plaintiff to the granting of the motion, and granting of judgment against plaintiff without a trial. *See Ghazali v. Moran*, 46 F.3d 52, 53-54 (9th Cir. 1995) (per curiam); *Brydges v. Lewis*, 18 F.3d 651, 653 (9th Cir. 1994).

3.   Defendants shall file a reply brief no later than fifteen (15) days after plaintiff's opposition is filed.

4.   The motion shall be deemed submitted as of the date the reply brief is due. No hearing will be held on the motion unless the Court so orders at a later date.

5.   All communications by the plaintiff with the Court must be served on defendants, or defendants' counsel once counsel has been designated, by mailing a true copy of the document to defendants or defendants' counsel.

1   6.   Discovery may be taken in accordance with the Federal Rules of Civil

2 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local

3 Rule 16-1 is required before the parties may conduct discovery.

4   7.   It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the

5 court informed of any change of address and must comply with the court's orders in a timely

6 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute

7 pursuant to Federal Rule of Civil Procedure 41(b).

8   8.   Extensions of time must be filed no later than the deadline sought to be

9 extended and must be accompanied by a showing of good cause.

10   **IT IS SO ORDERED**.

11 DATED: September 23, 2010

   _____
   RICHARD SEEBORG
12   United States District Judge

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No. C 09-1022 RS (PR)
ORDER